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No. 88-118

In the Supreme Court of the United States

OCTOBER TERM, 1988

GO AIR, INC., PETITIONER

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends (1) that the Federal Aviation Administration (FAA) violated the Due Process Clause of the Constitution when it revoked petitioner's certificate to service parts used in commercial airplanes, and (2) that the FAA violated the Administrative Procedure Act (APA) by not publishing and promulgating an agency policy manual as a substantive rule.

1. Petitioner is in the business of servicing parts used in commercial passenger aircraft. During February and March 1985, the FAA conducted an inspection of petitioner and its affiliates. The FAA found widespread violations of the agency's safety regulations. Thus, on May 2, 1985, the FAA exercised its authority under the Federal Aviation Act of 1958 (49 U.S.C. App. 1429(a) and 1485)

and revoked petitioner's Repair Station Certificate. Pet. App. 2a-3a, 27a, 30a n.1.[1]

The FAA's revocation order lists numerous safety violations. For example, the order cites instances of improper maintenance, deficiencies in petitioner's facilities and equipment, and significant problems with petitioner's recordkeeping (Pet. App. 6a-25a). The FAA concluded that petitioner "has failed to exercise the degree of care, judgment and responsibility required of the holder of a repair station certificate" (*id.* at 25a). The FAA also found that petitioner's continued operation posed an immediate risk to public safety (*id.* at 26a). Accordingly, the FAA "determined that safety in air commerce and the public interest" required that the agency's revocation order take effect immediately (*ibid.*).

Petitioner appealed the FAA order to the National Transportation Safety Board (NTSB). An evidentiary hearing was held before an administrative law judge. The administrative law judge affirmed all the pertinent findings in the FAA's revocation order. The full NTSB affirmed the administrative law judge's findings and decision. Pet. App. 29a-40a.[2]

The court of appeals denied petitioner's petition for judicial review of the NTSB decision. The court of appeals, in a brief unpublished order, stated that petitioner's arguments "have been considered and decided in a manner adverse to petitioner's contentions" (Pet. App. 42a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

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[1] The FAA also revoked the operating certificates held by petitioner's affiliates, Go Leasing, Inc. and Royal American Airways, Inc. Those entities are not a party to this action.

[2] Petitioner raised procedural issues before the NTSB, but it did not challenge the sufficiency of the evidence presented by the FAA.

other court of appeals. Thus, no further review is warranted.

a. Petitioner contends (Pet. 18-29) that its license to service and repair airplane parts was revoked without due process of law. Every court of appeals to consider such a claim has rejected it. Under the Federal Aviation Act, when the FAA Administrator issues an emergency order revoking a certificate to operate, an aggrieved party may immediately seek review by the NTSB. The NTSB must conduct a de novo evidentiary hearing on the merits of the FAA's findings (49 U.S.C. App. 1429(a)). And the NTSB must "finally dispose of the appeal within sixty days" (49 U.S.C. App. 1429(a)).[3] The decision of the NTSB is then subject to judicial review in a court of appeals (49 U.S.C. App. 1429, 1486). Three courts of appeals have held that this administrative process, coupled with judicial review, satisfies the Due Process Clause. See *Go Leasing, Inc.* v. *NTSB*, 800 F.2d 1514, 1523-1524 (9th Cir. 1986); *Morton* v. *Dow*, 525 F.2d 1302, 1305 (10th Cir. 1975); *Air East, Inc.* v. *NTSB*, 512 F.2d 1227, 1231 (3d Cir.), cert. denied, 423 U.S. 863 (1975).

The uniform view of the circuits is clearly correct. It is well settled that an agency may take emergency action when there is immediate danger to the public. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (drug with misleading label may be seized pending a hearing); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (food unfit for human consumption may be summarily seized and destroyed). And as the Third Circuit noted in *Air East, Inc.* v. *NTSB*, in the case of a violation of the FAA's safety regulations, "the stakes [are] high indeed—a threat to the lives of passengers who en-

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[3] In this case, petitioner waived its right to a ruling within 60 days by requesting several continuances (Pet. App. 38a).

trust[ ] themselves" to air carriers (512 F.2d at 1231). Thus, the risk to public safety justified the FAA's immediate revocation of petitioner's certificate; petitioner then was entitled to no more process than a prompt evidentiary hearing before the NTSB and judicial review of the decision of that body. See *Morton* v. *Dow*, 525 F.2d at 1305; *Air East, Inc.*, 512 F.2d at 1232.[4]

Moreover, the Ninth Circuit has held that the FAA's finding of an emergency—which makes the revocation of an FAA certificate effective immediately—is subject to judicial review in a court of appeals. See *Nevada Airlines, Inc.* v. *Bond*, 622 F.2d 1017 (9th Cir. 1980). Thus, in this case, petitioner could have sought immediate review of the FAA's finding of an emergency and could have asked the court of appeals for any appropriate temporary relief.[5] In a case where safety concerns are paramount, these multiple paths of review plainly satisfy due process.

b. Petitioner next contends (Pet. 30-36) that the FAA violated the APA (5 U.S.C. 552(a)(1) and 553) by not publishing in the *Federal Register* or promulgating as a substantive rule paragraph 1203.g of the FAA's *Compliance and Enforcement Program Manual* (May 16,

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[4] Petitioner repeatedly attacks the motives and integrity of FAA officials. The Ninth Circuit in *Go Leasing, Inc.* v. *NTSB, supra*, commented on similar allegations: "[W]e reject Go Leasing's numerous and repetitive assertions of a continuing conspiracy by the FAA to cover up its alleged lack of authority for so-called punitive certificate actions. Nor do we approve of Go Leasing's impugning of the ethics of FAA officials, its counsel, and of the NTSB. There is no evidence whatever of any cover-up or of any unethical conduct on the part of the FAA or NTSB" (800 F.2d at 1518).

[5] Before the FAA issued its order in this case, petitioner was well aware of the FAA inspection of its facilities. See Pet. 9. Thus, petitioner could have prepared an administrative record that would have supported any claim that the FAA acted arbitrarily or beyond its authority.

1980). That paragraph sets forth general guidelines used by the FAA's legal staff in deciding whether to take emergency actions.[6] Petitioner's claim is without merit.

The APA requires an agency to publish in the *Federal Register* its statements of general policy. See 5 U.S.C. 552(a)(1). That requirement, however, "attaches only to matters which if not published would adversely affect a member of the public." *Donovan* v. *Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1982) (collecting cases). Paragraph 1203.g is not such a matter. The First Circuit recently addressed a similar claim involving other paragraphs in the FAA's *Compliance and Enforcement Program Manual*. See *Capuano* v. *NTSB*, 843 F.2d 56 (1st Cir. 1988). The First Circuit correctly held (*id.* at 58) that the manual "is not intended to affect the rights, duties, obligations, or conduct" of the public and need not be published in the *Federal Register*. The manual "fits best the description of [5 U.S.C.] § 552(a)(2)(C)[, which refers to (among other things)] 'administrative staff manuals and instructions to staff that affect a member of the public' " (843 F.2d at 57-58). The FAA "has published the manual here at issue and the public can easily inspect, copy, or buy it. The APA requires no more" (*ibid.*).

Nor is paragraph 1203.g of the agency manual a substantive rule that must be promulgated under 5 U.S.C. 553. Paragraph 1203.g contains internal FAA enforcement policies, not rules of conduct applicable to regulated entities. As the court of appeals held in *Go Leasing, Inc.* v. *NTSB*, the FAA "need not promulgate rules constraining

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[6] Paragraph 1203.g states, in part: "Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and, thus, to provide immediate protection to the public. * * * An emergency suspension or revocation should never be used for punitive reasons."

[its] discretion as to when to employ a particular statutory enforcement action" (800 F.2d at 1523). Paragraph 1203.g is undoubtedly important to the FAA's administration of the Federal Aviation Act. But "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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